(5) Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

JAMES KNISKERN, et al.,
Petitioners,

v.

RON AMSTUTZ, et al.,
Respondents.

On Petition for Writ of Certiorari
To the Ohio Supreme Court & Ohio Court of Appeals,
Eighth Appellate District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Vol. IV of IV
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APPENDIX Q

STATEMENT OF ISSUES

(Appearing as part of Petitioners' Appellate Brief Supplementing their Assignment of Errors)

1.

Did The Common Pleas Court err in granting a summary judgment in favor of the defendant legislators holding that they were absolute immune on the basis of their legislative enactment, Am.Sub.H.B. No. 350, when the Court had before it the syllabus law of the Sheward decision which held that: "Am.Sub.H.B. No. 350 Usurps Judicial Power In Violation Of The Ohio Constitutional Doctrine Of Separation Of Powers and, Therefore, Is Unconstitutional In Toto"., by failing to find a 42 USC § 1983, liability exception under federal law under the Tenny decision which made clear that legislators usurpation of power subjected them to such a civil rights suit? (Assignment Error #1)

2.

Did the Common Pleas Court err in granting a summary judgment in favor of the defendant legislators once the Sheward decision found usurpation by failing to require the defendants to sustain their burden of proof to justify a summary judgment of dismissal by making a showing that the federal law applicable to plaintiffs' 42 USC § 1983 case, exonerates defendant legislators, sued in their individual capacity, who voted for Am.Sub.H.B. No. 350 and that the passage of Am.Sub.H.B. No. 350 did not by such usurpation

of judicial power, by operation of law, render plaintiffs' cases against the state and its political subdivisions, pending in the Supreme Court of Ohio upon plaintiffs' Memorandum In Support Of Jurisdiction, "de facto res adjudicata" their case by removing the Supreme Court Of Ohio's jurisdiction to grant plaintiffs a discretionary appeal under Article IV, § 2 (B)(2)(e), of the Ohio Constitution. (Assignment of Error #1)

3.

Did the Common Pleas Court err in granting a summary judgment in favor of the defendant legislators by failing to find that the enactment of Am.Sub.H.B. No. 350, usurping judicial power, legislatively, by operation of law, adjudicated plaintiffs' case, originating in the Court Of Claims, pending in the Supreme Court Of Ohio against the State, in the State's favor, was contrary to the law applicable to private parties, and violated Article I, § 10 of the U.S. Constitution, by impairing Ohio's statutory contract, R.C. § 2743.02(A)(1), with plaintiffs, depriving plaintiffs of the Equal Protection Of The Laws and their Due Process right to a meaningful hearing in a meaningful manner, appropriate to the nature of the case under the 14th Amendment to the U.S. Constitution? (Assignment of Error #2)

4.

Did the Common Pleas Court err, in denying plaintiffs Motion To Strike The Answers filed by the Attorney General of Ohio on behalf of the Defendant Legislators, by ignoring the controlling and preemptive law expressed in Hafer v Melo, Jr. (1991), 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed2d 301, that forbids State Treasury monies to be used for the defendant legislators' defense, in violation of plaintiffs' Due Process 14th Amendment U.S. Constitution rights? (Assgnt. of Error #3)

6.

Did the Common Pleas Court err in denying plaintiffs' Motion to strike the Attorney Generals' Answers finding by implication that the Attorney General has standing under federal law to defend the defendant legislators sued in their individual capacity? (Assignment of Error #3)

7.

Did the Common Pleas Court err in denying plaintiffs' Motion To Strike the Attorney Generals' Answers filed on behalf of the defendant legislators finding by implication that the Attorney General's privity with plaintiffs as to the cases against the State did not preclude the Attorney General from representing the defendant legislators sued in their individual capacity? (Assignment of Error #3)

8.

Did the Common Pleas Court err in denying plaintiffs' Motion To Strike the Attorney Generals' Answers, filed on behalf of the defendant legislators, without requiring a Motion To Intervene under Civ. R. 24 on behalf of the State where the Attorney General in those answers made no reservation of sovereign immunity on behalf of the State thereby making the State a real party in interest or "a person", for 42 USC § 1983 purposes? (Assignment of Error #3)

9.

In the context of the individual' due process liberty interest in freedom from arbitrary adjudicative procedures, when a person is deprived from the benefit of a judicial procedural rule of court, does due process start not with a judicial attempt to decide whether the rule created an "entitlement" that can be defined as "liberty" or "property," but with an assessment of what procedural protections are required in light of the governmental and private interests at stake? (Assignment of Error #4)

10.

Did the Common Pleas Court err in denying plaintiffs' Motion To Bifurcate for discovery purposes and then

summarily granting summary judgment in defendants favor when the Court was apprised that defendants' defense to discovery based upon privilege by virtue of the Speech and Debate Clause of the U.S and State Constitutions does not exist by virtue of U.S. Supreme Court adjudications? (Assignment of Error #1)

11.

Did the Common Pleas Court err in denying plaintiffs a partial declaratory summary judgment upon the law applicable to plaintiffs' 42 USC § 1983 damages, inasmuch as they are complicated, completely unsettled as a matter of law and judicial economy warrants there adjudication? (Assignment of Error #5).

APPENDIX R

APPELLANTS' MOTION FOR RECONSIDERATION TO THE OHIO SUPREME COURT

This Court is moved pursuant to SCt R XI § 2(A)(1) to reconsider its October 24th decision in this case, declining to grant a discretionary appeal for want of a substantial constitutional issue and grant Appellants a discretionary appeal for the following reasons.

A substantial constitutional question plainly surfaced when the Ohio General Assembly enacted S.B. 108. It became law on July 6, 2001 repealing Am.Sub.H.B. No. 350 and reviving the law as it existed prior to its enactment. It purported to conform to this Court's decision in State ex rel. Ohio Academy of Trial Lawyers v Sheward (1999), 86 Ohio St.3d 451. The General Assembly relied on, in part for the validity of S.B. 108, on the case of Weil v.Taxicabs of Cincinnati, Inc. (1942), 139 Ohio St. 198, 206, 22 O.O. 205, 208, 39 N.E.2d 148, 152 in which this Court stated:

> "The courts have generally held, notwithstanding this [current Section 15(D), Article II] and similar constitutional provisions, that where an act is amended, the part of the original act which remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions as having

become the law only at the time of the amendment" (cites omitted).

If the General Assembly is correct in relying on the above quote and S.B. 108 is given the presumption of constitutionality by this Court, then the General Assembly retroactively restored jurisdiction to this Court when it heard Appellants' original Memorandum in Support of Jurisdiction and Appellants' Motion for Reconsideration. Thus S.B. 108 seemingly renders Appellants' 42 U.S.C. 1983 claim in this case moot. That would be because the law with respect to private parties is subject to the changes in the law enacted by the General Assembly and because the State is no longer a party to this case in that Appellants have sued the defendant legislators in their individual capacity.

Appellants' claim in the underlying original case asserted that the defendant legislators had de facto, decided Appellants' case by the enactment of Am.Sub.H.B. No. 350. That enactment, it was asserted, removed this Court's constitutional jurisdiction to grant a discretionary appeal by removing the statutory predicate in Appellants' Memorandum In Support of Jurisdiction, that Appellants had contended raised a substantial constitutional question of public or great general interest. It deprived Appellants of their U.S. 14th Amendment Due Process rights to an entitlement ordinarily afforded others in this State. In that case the State of Ohio was a party defendant. Appellants were seeking a discretionary appeal from a decision in favor of the State that had been adjudicated in the Court of Claims

of Ohio.

When this Court denied Appellants a discretionary appeal in the underlying case, Appellants then filed their Motion for Reconsideration contending substantially that which this Court subsequently held in Sheward, supra, case. Appellants' motion unfortunately, was denied to Appellants by a 4 to 3 vote of this Court. Appellants attach that Motion for Reconsideration as "Exhibit A" and incorporate it by reference herein.

The right of the General Assembly to manipulate the law to the State's advantage when it is a party to suit originating in the Court of Claims, when Appellants were fully briefed before this Court on their Memorandum In Support of Jurisdiction, is and will always be, more than a gut blow below the belt, because it, respectfully, violates Article II § 28 of the Ohio Constitution as well as the U.S. Constitution, Article I § 10 by prohibiting states from impairing contracts. This Court is more than sufficiently able to protect the State's Court of Claims' contractual interest in such cases without the intervention of the General Assembly.

However, Appellants' 14th Amendment due process claim in the case sub judice did not originate in the Court of Claims of Ohio but originated in the Common Pleas Court of Cuyahoga County. The General Assembly may very well be able by legislative enactment to moot Appellants' 42 U.S.C. § 1983 case that claims that they were denied a meaningful hearing because the defendant legislators destroyed the Ohio Supreme Court's jurisdiction to hear Appellants' case and

circumvent Ohio's statutory contractual commitment to adjudicate their case in accordance with law applicable to private parties.

Appellants contend that S.B. 108 is prima facie presumed to be retroactive legislation because it expressly so states and by the application of R.C. § 1.48. Thus it is proper to analyze S.B. 108's operation as a violation Article II, § 28 of the Ohio Constitution because its legal effect is to further negate the quid pro quo of Appellants' case with the State, namely that Ohio's statutory law contractual commitment to Appellants that their Court of Claims case was to be decided by the law applicable private parties. That contractual commitment requires a judicial decision not a defacto legislative one.

Appellants rely on Johnson v BP Chemicals, Inc., (1999) 85 Ohio St.3d. 298 at pg. 303, 707 N.E.2d 1107 at pg. 1111, (which Appellants quote having deleted the interlineated case authorities cited therein), this Court stated:

> We do not dispute the long-standing principle that the General assembly has the authority, within constitutional limitations, to change the common law by legislation. We are also mindful of the fundamental precepts that all legislative enactments enjoy a strong presumption of constitutionality, and that the role of a court when considering the constitutionality of an Act is not to judge the wisdom of the legislation. However, these general principles are not absolute. Thus, when the validity of a statute is challenged on constitutional grounds, it is our duty

> to determine the meaning and effect of the constitution vis-a- vis the challenged legislation. Moreover, if the legislation at issue exceeds the limits of legislative power, we must protect the rights of the citizens effected by the law and, if appropriate, declare the legislation in valid.

Appellants contend S.B. 108 exceeds the limit of legislative power because it is a continuation of the usurpation of judicial power this Court found to be present in the enactment of Am.Sub.H.B. No. 350 as it declared in Sheward, supra, and for the same reasons. It patently violates the one subject rule because it so intimately intertwined with Am.Sub.H.B. No. 350 involving the same myriad of subjects and statutes

It is not entitled to the presumption of constitutionality. It does not qualify as legislation that moots the substantial constitutional issues raised of public or great general interest in Appellants' Memorandum in Support of Jurisdiction in the case at bar. Appellants attach as "Exhibit B", The Bill Analysis of the Legislative Service Commission of Sub. S.B. 108, and incorporate it by reference herein.

It may very well be that this Court has already concluded that Appellants' case is moot in reaching its October 24, 2001 decision. However, there is something diabolical and unrighteous in the recent passage on July 6, 2001 of S.B. 108 by the General Assembly that raises a substantial constitutional question of public or great general interest. It forms the predicate for Appellants' grounds for

reconsideration.

This Court knows via judicial notice of Civ R 44.1(A)(1) that the General Assembly in S.B. 108, repealed Am.Sub.H.B. No.350. It then in the same bill, reenacted by reviving all the statutes that theretofore existed as if Am.Sub.H.B. No 350 had not been passed, relying upon Article II, § 15(D) in the Ohio Constitution that provides:

> "No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed".

See page 12 "Exhibit B."

S.B. 108 purports to be remedial by reestablishing the legal statutory landscape prior to the decision in Sheward, supra. Sheward held that Am.Sub.H.B. No.350 was unconstitutional in toto and that it violated the one subject provision of the Ohio Constitution.

Appellants' contend that S.B.108 violates the one subject rule and is therefore unconstitutional. Appellants contend further that the enactment of S.B. 108 represents a continuous act by the defendant legislators in the General assembly of usurping the judicial power of the Court stemming from the enactment of Am.Sub.H.B. No. 350 to the present time. If Appellants establish probable cause herein that this so, then Appellants contend they have evidenced a substantial constitutional question of public or great general interest wherein this Court has jurisdiction to

grant a discretionary appeal to Appellants.

This is a daunting task, not only because S.B. 108 represents a welcome return to a tried and true statutory legal landscape, but because this Court has held in State v Thompkins (1996), 75 Ohio St.3d 558 at pg. 560 "[T]he legislation being questioned will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt."

How could any thinking person reasonably doubt, after this Court made it absolutely plainly clear in Sheward, supra, that this Court was enforcing the one subject rule with respect to Am.Sub.H.B. No. 350 because it involved over 100 statutes involving various subjects, -- that by reenacting and reviving through a replacement bill of over 100 statutes involving the very same various subjects and statutes,-- that such an enactment would not violate the same one subject rule – and that it therefore could be deemed and construed by this Court to be constitutional?

Revival of so many statutes in S.B. 108 directly connected to the same number of statutes that had been previously been specifically intertwined by amendment to Am.Sub.H.B. No. 350 in the same bill, is arbitrary and irrational in the context of Sheward, supra. It constitutes a deprivation of substantive due process under the Ohio and U.S. Constitutions.

The defendant legislators are reasonable thinking, but they are apparently committed to vindicate their legislative intent in Am.Sub.H.B. No. 350 one way or another for reasons Appellants attribute to "no fault lobbying" as

asserted by Appellants in the Court below. Obviously if S.B. 108 is deemed by this Court to be unconstitutional for violating the one subject rule of the Ohio Constitution, the defendant legislators will have succeeded in placing this Court in a position of enduring the chaos that accrues from the lack of true remedial legislation. Remedial legislation is and has been constitutionally required since the Sheward, supra, decision, but has not been forth coming. S.B. 108 has been intentionally enacted in bad faith.

The fault does not rest so much with the defendant legislators as it does with the lobbyists and their principals who undoubtedly financially secured the "no fault lobbying" commitment from them. These lobbyist and their principals are not entitled at law to lobby for ultra vires legislation that usurps the judicial authority of this Court in such a way that the political subdivisions of the State of Ohio are consequently and unconstitutionally denied their statutory delegated police power.

Plaintiffs-Appellants in the Court of Appeals argued that the defendant legislators were continuing to usurp the judicial authority of the Ohio Supreme Court following the Sheward decision in August of 1999 by failing to seasonably enact remedial legislation by the spring 2001. A reasonable inference should be drawn from the lack of remedial legislation that the quid pro quo between the lobbyists and the defendant legislators was "no fault lobbying" whereby the legislators would not enact remedial legislation if Am.Sub.H.B. No. 350 failed to pass constitutional muster. Either way the lobbyists obtained their

desired goal.

Appellants pointed out in the Court below out that the usurping of judicial power necessitating the Sheward decision resulted in an unconstitutional divestment of the State of Ohio's police power, e.g. R.C. 723.01. Thereafter in July 2001, the General Assembly enacted S.B. 108 that repealed Am.Sub.H.B. No. 350 and reinstated the entire law as it existed prior to the enactment of Am.Sub.H.B. No. 350 and seemingly restored the State's police power. If S.B. 108 is unconstitutional as contended, the State's political subdivisions are still unconstitutional denied their statutorily delegated police power.

Even if this Court is not disposed to adjudicate Appellants' case for whatever reason, it should nonetheless grant a discretionary appeal for the limited purpose of vindicating its own judicial authority by requiring the defendant legislators to show cause why they should not disgorge the proceeds from the lobbyists and their principals that they received both directly and indirectly for their ultra vires acts in passing Am.Sub.H.B. No. 350 and S.B.108 that Appellants contend usurped the judicial authority of this Court.

This legislative action of these defendants is a breach of the fiduciary duty they owe to the State as well as the Appellants. The Attorney General representing these defendants should be ordered to file an accounting with the Court in regard thereto and the moneys paid into the State treasury.

As stated in Scheuer v. Rhodes (1974) 416 U.S. 232

at pg. 237 , 94 S.Ct. 1683 at pg. 1686:

"Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he comes into conflict with the superior authority of that Constitution, an he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States,"

In Pennhurst State School & Hospital v. Halderman, (1984) 465 U.S.89 at pg 153, 104 S.Ct. 900 at 936, Judge Stevens in his dissent extensively reviewed the law of ultra vires and sovereignty with respect to the liability of public officials. He stated:

- "That the doctrine of sovereign immunity does not protect conduct which has been prohibited by the sovereign is clearly demonstrated by the case on which the petitioners clearly rely, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). The *Larson* opinion teaches that the actions of state officials that are not attributable to the state-- are *ultra vires* – in two different types of situations: (1) when the official is engaged in conduct that the sovereign has not authorized, and (2) when he has engaged in conduct that sovereign has forbidden. A sovereign, like any other principal, cannot authorize its agent to violate the law. When an agent does so, his actions are

considered *ultra vires* and he is liable for his own conduct under the law of agency. Both types of *ultra vires* conduct are clearly identified in *Larson.*"

CONCLUSION

Certainly the sovereign speaking through this Court cannot authorize the General Assembly to violate the one subject rule of the Ohio Constitution in S.B. 108 and allow the defendant legislators to moot Appellants' case before this Court a second time. Certainly in this case, this Court cannot allow to stand, the Attorney General's defense of the legislators sued in their individual capacity, that is compelled by Ohio's statutory scheme. The Attorney General's defense in the presence of the defendant legislators' continuous ultra vires acts, in the context of the adjudicated Sheward decision, supra, and the resultant breach of their fiduciary duty to this State & Appellants, for having received and retained lobbyists money for enacting Am.Sub.H.B. No. 350, that was adjudicated to have usurped judicial authority, an ultra vires act, is inter alia., a substantive Due Process denial of Appellants' rights under the U.S. 14th Amendment Constitution and the Ohio Constitution as well as a denial of Equal Protection clauses thereunder.

These developments discussed above, when read in pari materia with Appellants' Memorandum in Support of Jurisdiction herein, involve substantial constitutional questions of public or great general interest, warranting this Court to reconsider it October 24, 2001 order and grant Appellants their discretionary appeal.

Respectfully submitted,

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